


<p>आयुक्त का कार्यालय, केंद्रीय जी. एस. टी. एवं केंद्रीय उत्पाद शुल्क, अहमदाबाद – उत्तर, कस्टम हाउस, प्रथम तल, नवरंगपुरा, अहमदाबाद- 380009</p>		 <p>OFFICE OF COMMISSIONER CENTRAL GST & CENTRAL EXCISE, AHMEDABAD- NORTH CUSTOM HOUSE, 1ST FLOOR, NAVRANGPURA, AHMEDABAD-380009</p>
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निबन्धित पावती डाक द्वारा/By R.P.A.D

फा.सं./ F.No. V.24/15-10/OA/2017

आदेश की तारीख/Date of Order: - 11.01.2018

जारी करने की तारीख/Date of Issue :- 11.01.2018

द्वारा पारित/Passed by:-

आर. एम. गौतम / *R.M.Gautam*

अपर आयुक्त / *Additional Commissioner*

मूल आदेश संख्या / Order-In-Original No. 20/ADC/2017/RMG

जिस व्यक्ति(यों) को यह प्रति भेजी जाती है, उसके/उनके निजी प्रयोग के लिए मुफ्त प्रदान की जाती है।

This copy is granted free of charge for private use of the person(s) to whom it is sent.

इस आदेश से असन्तुष्ट कोई भी व्यक्ति इस आदेश के विरुद्ध अपील, इसकी प्राप्ति से 60 (साठ) दिन के अन्दर आयुक्त (अपील), केन्द्रीय वस्तु एवं सेवा कर एवं उत्पाद शुल्क, केन्द्रीय उत्पाद शुल्क भवन, अंबावाड़ी, अहमदाबाद 380015-को प्रारूप संख्या इ.ए-1 (E.A.-1) में दाखिल कर सकता है। इस अपील पर रु .2.00 (दो रुपये) का न्यायालय शुल्क टिकट लगा होना चाहिए।

Any person deeming himself aggrieved by this order may appeal against this order in form EA-1 to the Commissioner(Appeals), Central GST & Central Excise, Central Excise Building, Ambawadi, Ahmedabad-380015 within sixty days from the date of its communication. The appeal should bear a court fee stamp of Rs. 2.00 only.

इस आदेश के विरुद्ध आयुक्त के शुल्क गये मांगे पहले से करने अपील में (अपील) 7.5% का भुगतान करना होगा, जहाँ शुल्क यानि की विवादग्रस्त शुल्क या विवादग्रस्त शुल्क एवं दंड या विवादग्रस्त दंड शामिल है।

An appeal against this order shall lie before the Commissioner (Appeal) on payment of 7.5% of the duty demanded where duty or duty and penalty are in dispute, or penalty, where penalty alone is in dispute. (as per amendment in Section 35F of Central Excise Act, 1944 dated 06.08.2014)

उक्त अपील, अपीलकर्ता द्वारा प्रारूप संख्या इ.ए.-1 में दो प्रतियों में दाखिल की जानी चाहिए। उस पर केन्द्रीय उत्पाद शुल्क (अपील) नियमावली 2001 के नियम 3 के प्रावधानों के अनुसार हस्ताक्षर किए जाने चाहिए। उक्त अपील के साथ निम्नलिखित दस्तावेज संलग्न किए जाएं।

(11) उक्त अपील की प्रति।

(12) निर्णय की प्रतियाँ अथवा जिस आदेश के विरुद्ध अपील की गई है, उनमें से कम से कम एक प्रमाणित प्रति हो, या दूसरे आदेश की प्रति जिसपर रु) 2.00 .दो रुपये (का न्यायालय शुल्क टिकट लगा होना चाहिए।

The appeal should be filed in form EA-1 in duplicate. It should be signed by the appellant in accordance with the provisions of Rule 3 of Central Excise (Appeals) Rules, 2001. It should be accompanied with the following:

(11) Copy of accompanied Appeal.

(12) Copies of the decision or, one of which at least shall be certified copy, the order Appealed against OR the other order which must bear a court fee stamp of Rs.2.00.

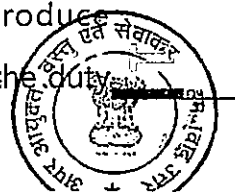
विषय: -कारण बताओ सूचना/Show Cause Notice F.No. V.24/15-10/OA/2017 dated 31.05.2016 issued to M/s. Urmin Marketing Pvt. Ltd.(now M/s Unicorn Packaging LLP), 61, Mahagujarat Industrial Estate, Sarkhej-Bavla highway,Changodar, Ahmedabad-382213, State : Gujarat.

Brief facts of the case:

On scrutiny of declaration dated 09.11.2015 filed in Form -1 by M/s. Urmin Marketing Private Ltd (now M/s. Unicorn Packaging LLP), 61, Mahagujarat Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad-382213 (hereinafter referred as 'the assessee'), holding Central Excise Registration Certificate No. AAACU9197REM001 and who are engaged in the manufacture of "**Chewing Tobacco/Jarda Scented Tobacco**" falling under Chapter 24 of the First Schedule to the Central Excise Tariff, 1985, it is noticed that the assessee, who are clearing the said goods under Compounded Levy Scheme w.e.f. 08.03.2010, in terms of "Chewing Tobacco and Un-manufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010"(referred to as "Chewing Tobacco... Rules, 2010) notified vide Notification No.11/2010-C.E. (N.T.), dated 27.02.2010 have taken suo-moto abatement of duty, which is not admissible under the above mentioned rules, for the period of non-production (01.11.2015 to 16.11.15) of said notified goods.

2. The applicable duty on Chewing Tobacco & Unmanufactured Tobacco is notified vide Notification No. 11/2010-CE(NT) dt 27.02.2010 as amended vide Notification no. 05 /2015 – Central Excise dt 01.03.2015 which prescribes the central excise duty of ₹ 69.55 Lakh per packing machine packing 301 pouches & above per minute of Retail sale price exceeding ₹ 1.50 but not exceeding ₹ 2.00 per month Without lime tube/ lime pouches. The declaration filed by the party on 9.11.2015 with the jurisdictional Assistant Commissioner and the jurisdictional Range Superintendent, revealed that during the month November 2015, the assessee had opened three (03) Pouch Packaging Machines (PPMs) of MRP ₹ 2/- from the midnight of 16.11.2017 (w.e.f. 17.11.2015). Thus in the month of November 2015, only three PPMs were operated for 14 days only. Later vide Form-2 submitted on 16.11.2015 they also informed the jurisdictional Assistant/Deputy Commissioner and Range Officer that they have paid proportionate duty amounting to ₹ 97,37,000 {₹ 69,55,000/ multiplied by 3 machines divided by 30 multiplied by 14 days }(vide Challan No. 50656 dated 16.11.2015) for the pouch packing machines operated for 14 days in November, 2015.

3. In terms of Rule 10 of the said Rules, in case a factory did not produce the notified goods during any continuous period of **fifteen days** or more, the duty



calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, at least three working days prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that the packing machines so sealed cannot be operated during the said period.

4. In view of aforesaid provisions, it appeared that the assessee was required to deposit the duty for the entire-month in advance i.e. by 5th of the same month at appropriate rate specified in the Notification No.16/2010-CE dated 27.02.2010 (amended vide Notification No. 05/2015-CE dated 01.03.2015). The Board vide Circular issued vide F.No:267/16/2009-CX-8 dated 12.3.2009 clarified that in terms of Rule 10 ibid in case a factory did not produce notified goods during any continuous period of 15 days or more, the abatement of duty has to be given and the jurisdictional Assistant/Deputy Commissioner of Central Excise has to pass an abatement order in the case.

5. Accordingly, the differential duty required to be paid by the assessee for the period 01.11.15 to 16.11.15 works out to as under. The assessee appeared to have short-paid the duty as shown in column No.5.

Month	Rate of Duty per packing machine	Duty liable to Pay on three	Duty Paid	Difference
(1)	(2)	(3)	(4)	(5)
November,15 (3 PPMs)	₹69.55 Lac/month	₹ 2,08,65,000/-	₹ 97,37,000/-	₹ 1,11,28,000/-

6. In view of above, M/s. Urmin Marketing Private Limited, 61, Mahagujarat Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad-382213, were therefore, called upon to show cause as to why;

- (i) The Central Excise Duty amounting to ₹. **1,11,28,000/-** (Rupees One Crore Eleven Lakh Twenty Eight Thousand only) should not be recovered from them under the provisions of Rule 19 of Chewing Tobacco....Rules, 2010 read with Section 11A(1) of the Central Excise Act,

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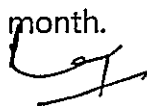
1944.

- (ii) Interest at the applicable rate should not be recovered from them under Rule 9 of Chewing Tobacco....Rules, 2010 read with Section 11AA of the Central Excise Act, 1944
- (iii) Penalty should not be imposed on them under Rule 18 of Chewing Tobacco....Rules, 2010 read with Rule 25 of the Central Excise Rules, 2002.

7. Defense Reply:

In response to the above notice, the assessee vide letter dated 27.12.2017 furnished their written submission wherein they *inter alia* submitted that;

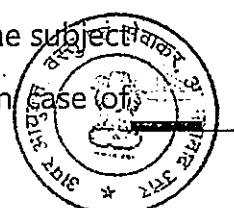
- It is an undisputed fact that the pouch packing machines were installed after 5th Nov, 2015 and during the period under consideration, the entire factory remained closed continuously for a period from 1.11.2015 to 16.11.2015 exceeding 15 days for which no abatement has been claimed in terms of Rule 10 of Chewing Tobacco and Un-manufactured Tobacco Packing Machine (Capacity Determination and Collection of Duty) Rules, 2010; that the duty on the three packing machine was paid on proportionate basis.
- Rule 6 provides for filing declaration at least three working days in advance in the case of addition or removal of pouch packing machine. The period of three days is given only to approve the declaration and re-determine the annual capacity based on which the duty is required to be paid. It does not stipulate that the monthly duty in all cases payable has to be paid by 5th of the same month, even if no pouch packing machine was installed or operating for the whole month or a part of the month. Rule 9 comes into play only in case the manufacturer is required to pay the duty for the complete month. The above contention finds support from the fourth proviso to Rule 9 of the said Rules, which provide that in case of increase of operating packing machines during the month on account of addition or installation, the differential duty amount, if any, is required to be paid by 5th day of following month. The legislature has deliberately incorporated the said proviso in order to take care of the payment of duty in case the pouch packing machines are installed after 5th day
- month.





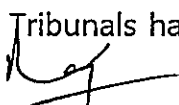
- It is well settled law that a specific provision always prevails over the general provisions. The fourth proviso to Rule 9 of the said Rules specifically provides that in case of any addition or installation of Pouch Packing Machines, the duty is required to be paid by 5th day of the next of the month.
- In all cases the duty is payable by 5th of the same month for the reason that the deposit of duty is directly linked with the number of PPMs operating and installed. Thus, if the said number of PPMs is not ascertainable or known, the manufacturer cannot be expected to deposit the duty on any hypothetical basis. In the present case, in all the months, there was no manufacturing operation by us during the period in which the due date fell i.e. on 5th day of the month, no pouch packing machines were operational and therefore the duty could not be determined by 5th day of the month, consequently no duty and interest was payable. In support of above contention, they placed reliance on the decision of the Hon'ble Tribunal in the case of **Trimurti Fragrance P. Ltd. Vs Commissioner reported at 2016(335) ELT 167 (Tribunal) and Taste Well Product Vs Commissioner reported at 2016 (335) ELT 55 (Tri.-Del.)**
- Payment of interest for alleged delay in duty payment is not applicable in the facts of the case on hand. The interest liability can be fastened, only when a person fails to pay the duty by due date. In the present case, the production activity was not in operation continuously for a period of more than 15 days. No pouch packing machines were operational before the 5th day of the month and as such, we were not even aware as to how long our factory would remain closed. We have deposited the duty promptly on resumption of production and therefore there is no question of payment of interest. In support of above contention, we place reliance on the decision of the Hon'ble Tribunal in the case of **Jaiswal Products Vs Commissioner reported at 2016-TIOL-1277-CESTAT-DEL.**
- Rule 9 of the said Rules, nowhere stipulates that the duty in all cases has to be paid by 5th day of the same month. It is well settled law that in any fiscal statute, there is no room for intendment meaning thereby that if a word has not been used, it cannot be read in and conversely, if a word has been mentioned in, the duty by 5th day of the month even when the PPMs were not installed, no interest is payable. Consequently, the proceedings initiated vide the subject notice is not sustainable.
- Without prejudice to the aforesaid contention, it is submitted that in the subject case of show cause notice, it has been assumed that only differential duty in

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increase is covered under the fourth proviso to Rule 9 of the said Rules. A plain reading of the said 4th proviso does not make any such stipulation as alleged in the show cause notice. The word differential duty has not been mentioned in the said 4th proviso to Rule 9 and therefore the same could not have been added for charging any interest on the alleged ground of delay in depositing the duty.

- Further at the time of sealing of the pouch packing machines, the same are uninstalled and therefore at the time of installation, it is an addition of machine for which the 4th proviso to the Rule 9 of the said Rules is attracted. The duty having been deposited within the time limit prescribed under the 4th proviso to Rule 9 of the said Rules, no interest is payable and the proceedings vide the subject notice are required to be withdrawn,
- The parent provisions of Section 3A of the Central Excise Act, 1944 (said Act) itself provides for calculation of the duty on the proportionate basis and there is no provision what so ever under the said Act or the Rules made there under to conclude that the duty is required to be paid, when no PPM is installed or operative.
- In the present case, it cannot be the intention to charge duty, when the entire factory is closed and no Pouch Packing Machine is installed in the factory. The question of payment is only after it is held that the duty was required to be paid and the same had not been paid. In the present case, no duty was required to be paid for the period during which the pouch packing machines were not installed and installed in all cases after the 5th day of the month. As such, the question of payment of interest does not arise.
- In the central excise act, the duty is required to be paid on the goods manufactured and if no goods are manufactured, no duty is payable, and consequently no interest is payable. If the interpretation as canvassed in the impugned order is to be considered, it would mean that in all cases, whether a manufacturer has any Pouch Packing machines installed in his factory or not, the duty for the month is required to be paid by 5th day of the month. Such an interpretation would make the third proviso to Rule 9 of the said Rules redundant and nugatory. The appellant submits that such cannot be the intention in collecting the interest on the duty which is admittedly not payable by the manufacturer.
- The subject notice proposes to impose penalty under Rule 18 of the said Rules read with Rule 25 of the said Central Excise Rules, 2002. Various courts and Tribunals have consistently held that the penalty should not be imposed in an





ordinary course, unless it can be shown that the appellant had acted deliberately in defiance of Law. Hon'ble Supreme Court in case of **Hindustan Steel Ltd. VS. State of Orissa reported at AIR 1970 SC (253) (1979 ELT (J402)** has held that for imposition of penalty, it is to be brought on record that the party had acted deliberately in defiance of the law. In the present case there is nothing on the record which reveals that we had acted in any way in defiance of law. As such, the subject notice having been passed without any material evidence on record is legally not tenable and the same deserves to be withdrawn.

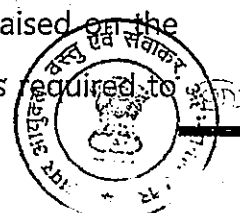
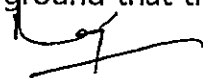
- For imposing penalty the requisite *mens rea* has to be established, as held by the Hon'ble Supreme Court in the case of **Akbar Badruddin Jiwani VS Collector of Customs reported at 1990 (47) ELT 161 (SC)**. The words typically imposing a *mens rea* requirement include willfully, maliciously, fraudulently, recklessly, negligently, corruptly, feloniously and wantonly. In the present proceeding, the element of *mens rea* being absent, the imposition of penalty is not warranted.
- It is also submitted that the issue involved in the present case is of interpretation of a provision of law which provides the date of payment of duty. According, to us the duty is required to be paid as per the 4th proviso to Rule 9 of the said Rules. In any case, the issue involved being of interpretation of statutory provisions, no penalty is imposable.
- In the aforesaid premises, the demand of duty and interest made vide the subject notice being not sustainable, without authority of law and is required to be withdrawn in the interest of justice.

8. Personal Hearing:

A personal hearing in the case was granted on 17.11.2017 but nobody appeared. Therefore another date was accorded on 27.12.2017. Shri N.K.Tiwari, Consultant appeared before me and submitted the written submission dated 27.12.2017. He relied on CESTAT Order dated 22.7.2015 passed in their favour. He also relied on OIO No.02-03/ADC/2016/DSN dated 25.04.2016 on similar issue wherein the demand was dropped.

Discussion & Finding:

9. I have gone through the Show Cause Notice, written submissions and the case laws relied by the assessee very carefully. The entire demand has been raised on the ground that the assessee cannot pay duty on the pro-rata basis but he is required to

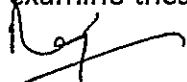


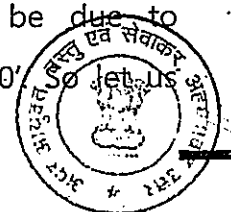
pay the duty for the entire month and thereafter can claim the abatement in terms of Rule 10 of the Chewing Tobacco ... Rules, 2010.

10. In terms of Rule 6(1) of Chewing Tobacco ... Rules, 2010, the manufacturer shall file a declaration of the production capacity with details of packing machines to the Deputy/Assistant Commissioner of Central Excise, who after making inquiry approve the declaration and pass an order concerning the annual capacity of production of the factory within three working days, in terms of Rule 6(2). As per Rule 7 of the said Rules, the duty shall be calculated by the manufacturer for a month as per rate of duty specified in the Notification No.16/2010-CE dated 27.02.2010, to the number of the operating packing machines in the factory during the month. The manner and the payment of duty & interest are provided in Rule 9. The monthly duty payable on notified goods shall be paid by 5th day of the same month and intimation shall be filed with the jurisdictional Superintendent of Central Excise before 10th of the same month. In case the manufacturer permanently discontinues manufacture of goods of existing retail sale price or commences manufacture of goods of a new retail sale price during the month, the monthly duty payable shall be recalculated on the pro-rata basis of the total number of days and in case the amount of duty so re-calculated is less than the duty paid for the month so recalculated, the balance shall be refunded to the manufacturer by the 20th day of the following month.

11. In the instant case, the assessee, operated three Pouch Packing Machines (PPMs) for 14 days i.e. (17.11.2015 to 30.11.2015) thus there was no production during the period 01.11.15 to 16.11.2015 (ie for continuous period of 16 days). The assessee is contending that they have not claimed any abatement under Rule 10 for the closure period (01.11.2015 to 16.11.2015) but they have paid duty on pro-rata basis of the total number of 14 days (from 17.11.15 to 30.11.15) of the commencement of the manufacture of goods in that month, in terms of the proviso to Rule 9 of the said Rules.

12. The controversy, involved in the present case, appears to be due to interpretation of Rule 9 & Rule 10 of 'Chewing Tobacco ... Rules, 2010' examine these rules- ;





Rule 9. Manner of payment of duty and interest. - The monthly duty payable on notified goods shall be paid by the **5th day of same month** and an intimation in Form - 2 shall be filed with the Jurisdictional Superintendent of Central Excise before the 10th day of the same month :

Provided..... July, 2008 :

Provided further that if the manufacturer fails to pay the amount of duty by due date, he shall be liable to pay the outstanding amount along with the interest at the rate specified by the Central Government vide notification under section 11AB of the Act on the outstanding amount, for the period starting with the first day after due date till the date of actual payment of the outstanding amount :

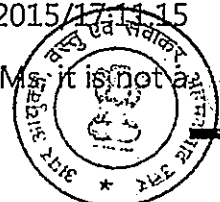
Provided following month :

Provided also that in case a manufacturer permanently discontinues manufacturing of goods of existing retail sale price or commences manufacturing of goods of a new retail sale price during the month, the monthly duty payable shall be recalculated pro-rata on the basis of the total number of days in that month and the number of days remaining in that month counting from the date of such discontinuation or commencement and the duty liability for the month shall not be discharged unless the differential duty is paid by the 5th day of the following month and in case the amount of duty so recalculated is less than the duty paid for the month, the balance shall be refunded to the manufacturer by the 20th day of the following month.

Rule 10. Abatement in case of non-production of goods.-

In case a factory did not produce the notified goods during any continuous period of fifteen days or more, the duty calculated on a proportionate basis shall be abated in respect of such period provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, with a copy to the Superintendent of Central Excise, **at least three working days** prior to the commencement of said period, who on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under the physical supervision of Superintendent of Central Excise, in the manner that these cannot be operated during the said period:

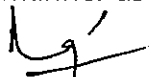
13. From the above paras, it is clear that in terms of Rule 9, the monthly duty on notified goods is payable by 5th of the same month, however, in terms of 4th proviso, in case the manufacturer during the month permanently discontinues manufacture of existing retail sale price or commences manufacture of goods of new retail sale price, then the monthly duty shall be recalculated on pro-rata basis on the number of days of such commencement or discontinuation and the differential duty for the month shall be paid by the 5th of the following month. On going through the Form-1 filed by the assessee, I find that out of 24 (sealed) packing machines of MRP up to ₹ 2/pouch, the assessee intended to operate only 3 (three) packing machines during November, 2015. The Jurisdictional Assistant Commissioner vide letter dated 13.11.2015 granted the permission to de-seal / install 03 PPMs in the mid-night of 16.11.2015/17.11.15 (effective from 17.11.2015). Since the de-sealing was done of existing PPMs, it is not

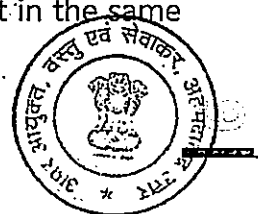


case of permanent discontinuation of manufacture or commencing manufacture of goods of new retail sale price. I therefore find that proviso to Rule 9 cannot be invoked in the instant case. Hence the assessee's contention that they were not claiming abatement under Rule 10 but were paying duty on pro-rata basis in terms of above provision of Rule 9 is not tenable.

14. Now coming to Rule 10 of the 'Chewing Tobacco ... Rules, 2010', I find that the same is applicable in case a factory did not produce notified goods during any continuous period of 15 days or more. In such case the duty shall be reduced on pro-rata basis in case of non-production of goods, provided the manufacturer of such goods files an intimation to this effect with the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, at least three working days prior to the commencement of said period. In the instant case, the assessee intimated commencement of production of the notified goods of **existing retail sale price**. Thus in such scenario, the manufacturer in terms of Rule 10 has to file intimation to the JAC within three working days prior to commencement of said period with a request to reduce the duty on pro-rata basis for such non-production of goods. The JAC on receipt of such intimation shall direct for sealing of all the packing machines available in the factory for the said period under physical supervision of Superintendent of Central Excise, the manner that the packing machines so sealed cannot be operated during the said period. In case the manufacturer intends to restart his production of notified goods, he shall inform to the Deputy Commissioner of Central Excise or the Assistant Commissioner of Central Excise, as the case may be, of the date from which he would restart production, whereupon the seal fixed on packing machines would be opened under the physical supervision of Superintendent of Central Excise.

15. In terms of above provisions, the assessee had restarted the production of three PPMs and are liable to pay duty on the pro-rata basis i.e for the period from 17.11.2015 to 30.11.2015 (14 days) after claiming abatement in respect of such period when the notified goods were not produced. Notice alleges that such *suo moto* abatement is not available as Board vide **Circular No.267/16/2009-CX-8 dated 12.3.2009** has clarified that in terms of Rule 10 of the said rules, the abatement of duty is to be given, in case the factory did not produce notified goods during any continuous period of 15 days or more. The JDC/JAC has to pass an abatement order in the case. And such abatement orders are subjected to pre and post audit in the same manner as the refund / rebate orders.





16. Now the question arises, whether such abatement is *suo moto* or is in the nature of refund, where the assessee is required to pay the duty as determined under Rule 9 of the said 'Chewing Tobacco ... Rules, 2010' by 5th of the same month and the department, after following the procedure of pre and post audit shall allow such abatement. In the instant case the assessee vide intimation dated 9.11.2015 informed the department regarding commencement of production of notified goods w.e.f. 17.11.2015 (i.e. 8 days in advance). However, they took *suo moto* abatement and paid duty proportionately only for 14 days in November, 2015 when three PPMs were actually operational. The notice alleges that such *suo moto* abatement is not allowed hence the assessee should have paid the entire duty by 5th of the same month and applied for abatement in the subsequent month.

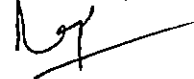
17. In this regard, the assessee has placed reliance on the Hon'ble CESTAT Order No.A/11068-11072/2015 dated 22.7.2015 passed in their own case wherein Hon'ble Ahmedabad Tribunal has set-aside the demand against them by agreeing to Tribunal's own decision passed in the case of Thakkar Tobacco Products Pvt. Ltd which was subsequently upheld by Hon'ble High Court of Gujarat.

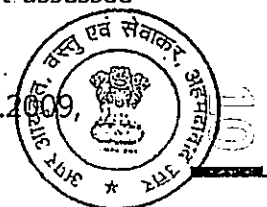
18. Hon'ble Gujarat High Court in Tax Appeal No. 619 of 2015 filed by the department on similar issue in the case of **Thakkar Tobacco Products Pvt. Ltd (reported in 2016 (332) E.L.T. 785 (Guj.))** vide Order dated 1.10.2015 dismissed the Tax Appeal holding that "*When the rules do not provide for the manner in which duty is required to be abated, nor do they provide that abatement shall be by an order of the Commissioner or any authority, but nonetheless provide for abatement of duty and the extent of entitlement to such abatement, no fault can be found in the approach of the assessee in suo motu taking the benefit of such abatement.*"

18.A Hon'ble High Court at para -9 of the above Order held that, (relevant text is reproduced below);

"...Tax abatement is ordinarily known as reduction of or exemption from tax by a Government for a specific period. A tax incentive is also stated to be a form of tax abatement. Thus, the ordinary meaning of abatement is reduction, diminution and, therefore, when an assessee is entitled to abatement of duty, he is entitled to reduction of duty to that extent and not refund thereof as is sought to be contended on behalf of the Revenue. It would have been a different matter if the rules prescribed for the manner in which abatement has to be granted. However, in the absence of any rule in this regard or any specific provision providing for the mode of availing abatement, the course of action adopted by the respondent-assessee cannot be said to be in violation of any rule or any provision of the Act. "

18.B Hon'ble High Court in respect of Board's Circular dated 12.3.2009, held that;





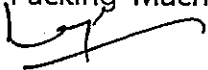
" ... the said circular proceeds on the footing that abatement orders are to be passed by the JDC/JAC and accordingly provides for application of circulars issued in the context of pre- and post-audit in relation to refund/rebate claims to abatement orders. However, the said circular nowhere provides for the procedure to be followed for granting abatement. As noticed earlier, the Act and the PMPM Rules are totally silent as regards the manner in which the abatement is to be granted and do not speak of any order of abatement being passed by the JDC/JAC. In the opinion of this Court, in the absence of the Act or the rules framed there under making any such provision, no such provision can be read into the Act and the rules."

18.C Hon'ble High Court while referring to Rule 9 & 10 of the Pan Masala Packing Machines (Capacity Determination & Collection of Duty) Rules, 2008 observed that when the intention of the Government is that the amount is to be refunded and an express provision is provided therefore, whereas Rule 10 does not make any such provision. There is no provision for making an order of abatement under Rule 10 of the Pan Masala Packing Machines (Capacity Determination & Collection of Duty) Rules, 2008. Rule 10 provides for abatement of duty calculated on proportionate basis in case where the factory does not produce notified goods during any continuous period of fifteen days or more. However, such abatement is subject to the conditions stipulated there under as referred to hereinabove. Once such conditions are satisfied, the assessee becomes entitled to abatement of duty to the extent of the days the factory did not produce the notified goods. Therefore, in the absence of any specific provision for making an order of abatement, it cannot be said that the action of the assessee in calculating the duty on a proportionate basis and setting off the same against the duty payable in the succeeding month is, in any manner, violates the rules or the statutory scheme. Relevant extract of Para 15 & 16 of Hon'ble High Court's above mentioned order is reproduced below for ready reference;

"15. ...The abatement, in the opinion of this Court, is not akin to refund and means reduction or diminution of the duty. Therefore, when the duty stands reduced to the extent provided in the rule, there is no liability to pay the same, inasmuch as, to that extent the duty stands abated. Therefore, if the assessee has correctly calculated the proportion of duty and set off the same against the duty payable for the next month, it cannot be said that the said action is contrary to the statutory scheme. When the rules do not provide for the manner in which duty is required to be abated, nor do they provide that abatement shall be by an order of the Commissioner or any authority, but nonetheless provide for abatement of duty and the extent of entitlement to such abatement, no fault can be found in the approach of the assessee in suo motu taking the benefit of such abatement.

16. In the light of the above discussion, it cannot be said that the view adopted by the Tribunal is not a plausible view warranting interference by this Court. In the absence of any infirmity in the impugned order passed by the Tribunal, it is not possible to state that the same gives rise to any question of law, much less, a substantial question of law. The appeals, therefore, fail and are accordingly dismissed."

19. I find that Hon'ble High Court in the above judgment has dealt with Pan Masala Packing Machines (Capacity Determination and Collection of Duty) Rules, 2008



whereas in the instant case the demand issued is in terms of Chewing Tobacco and Un-manufactured Tobacco Packing Machines (Capacity Determination and Collection of Duty) Rules, 2010. Since the provisions of both the rules are similar I find that the ratio of the above judgment can be applied to the instant case.

20. By applying the ratio of above decision dated 1.10.2015 in the instant case, I find that since the duty liability for the operating period have already been discharged by the assessee, they are entitled for the abatement for the period when the PPM Machines were not operational. Thus by giving timely intimation to the department the assessee has followed the conditions of Rule 10 of Chewing Tobacco ... Rules 2010, hence are eligible for the abatement under Rule 10 of the said Rules. Thus, I find that the demand of duty, question of levy of interest and penalty does not arise.

21. In view of the foregoing discussion & findings, I pass the order as under :-

ORDER

I drop the proceedings initiated vide SCN No.V.24/15-10/OA/2017 dated 12.7.2017 against M/s. Urmin Marketing Private Limited (now M/s. Unicorn Packaging), 61, Mahagujarat Industrial Estate, Sarkhej-Bavla Highway, Changodar, Ahmedabad.

R.M. Jaisam
(R.M. Jaisam)

Additional Commissioner
Central GST & Central Excise,
Ahmedabad North

F.No: V.24/15-10/OA/2017

Date: 11.01.2018

BY RPAD/HAND DELIVERY

M/s. Urmin Marketing Private Limited (now M/s. Unicorn Packaging),
61, Mahagujarat Industrial Estate,
Sarkhej-Bavla Highway, Changodar,
Ahmedabad-382213

Copy to:

1. The Commissioner, C.Ex.& CGST, Ahmedabad-North.
2. The Deputy Commissioner, C.Ex.& CGST, Division-IV, Ahmedabad-North.
3. The Assistant Commissioner (RRA), C.Ex.& CGST, Ahmedabad-North.
4. The Superintendent, C.Ex.& CGST, AR-II, Division-IV, Ahmedabad-North.
5. Guard File.



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11